

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON

**FILED**

AUG 12 2003

SAMUEL L. KAY, CLERK  
District & Bankruptcy Courts  
Southern District of West Virginia

PENNY KENNEDY, and  
RAYMOND KENNEDY, individually  
and as guardians and next  
friends of  
TREVOR KENNEDY, an infant  
under the age of eighteen,

Plaintiffs,

v.

CIVIL ACTION NO. 2:03-0175

UNITED STATES OF AMERICA;  
CHARLESTON AREA MEDICAL CENTER, INC.  
dba Women and Children's Hospital of West Virginia  
dba Women and Children's Hospital  
dba CAMC Children's Hospital  
dba Women and Children's Hospital;  
INPHYNET HOSPITAL SERVICES, INC.,  
a foreign corporation, doing business  
in the State of West Virginia; and  
GORDON J. GREEN, Dr., individually,

Defendants.

UNITED STATES' ANSWER TO AMENDED COMPLAINT

COMES now the United States of America, ("United States"),<sup>1</sup> in  
answer to the Amended Complaint and says:

FIRST DEFENSE

1. The Amended Complaint fails to state a claim upon which  
relief can be granted.

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<sup>1</sup> Community Health Foundation of Man, West Virginia, Inc.,  
and Plaridel Tordilla were dismissed by Order Entered on July 9,  
2003, to which reference is hereby made.

SECOND DEFENSE

2. The United States in answer to paragraphs 1, 2, and 3 of the Amended Complaint admit the same.

3. The United States in answer to paragraphs 4, 5, 6, 7, and 8 of the Amended Complaint lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

4. The United States in answer to paragraph 9 of the Amended Complaint admits that plaintiff is alleging that all actions taken herein by the United States at the Community Health Foundation of Man, Logan County, West Virginia, on or about April 25, 2000. The United States lacks sufficient knowledge or information to form a belief as to the remaining allegations of paragraph 9.

5. The United States in answer to paragraphs 10, 11, 12, 13, and 14 of the Amended Complaint admits the same.

6. The United States in answer to paragraph 15 of the Amended Complaint realleges its answer to paragraphs 1-14 which are incorporated herein by reference.

7. The United States in answer to paragraph 16 of the Amended Complaint admits that Dr. Tordilla is a medical doctor who practices as a pediatrician and is licensed to do so by the State of West Virginia.

8. The United States in answer to paragraph 17 of the Amended Complaint admits that Trevor Kennedy was a patient of Dr. Tordilla.

9. The United States in answer to paragraph 18 of the Amended Complaint denies the same.

10. The United States in answer to paragraph 19 of the Amended Complaint admits that Trevor Kennedy was a patient of Dr. Tordilla and that Dr. Tordilla was aware of Trevor Kennedy's prior medical history as reflected in the medical records of the Community Health Foundation, Inc. The United States denies that Dr. Tordilla failed to appreciate the seriousness of plaintiff's presenting problems.

11. The United States in answer to paragraph 20 of the Amended Complaint denies the same.

12. The United States in answer to paragraphs 21, 22, and 23 of the Amended Complaint denies the same.

#### THIRD DEFENSE

13. The United States in answer to paragraph 24 of the Amended Complaint incorporates herein by reference its answers to paragraphs 1-23 of the Amended Complaint.

14. The United States in answer to paragraph 25 of the Amended Complaint admits that the Community Health Foundation of

Man, Inc., provides medical care, including pediatric care, and in doing so for its patient Trevor Kennedy its agents, servants, and employees were acting within the scope of their employment. The United States specifically denies the remaining allegations of paragraph 25.

15. The United States in answer to paragraphs 26, 27, and 28 of the Amended Complaint denies the same.

#### FOURTH DEFENSE

16. The United States in answer to paragraph 29 of the Amended Complaint incorporates herein by reference its answers to paragraphs 1-28.

17. The United States in answer to paragraphs 30, 31, 32, 33, 34, 35, 36, and 37 of the Amended Complaint lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

#### FIFTH DEFENSE

18. The United States in answer to paragraph 38 of the Amended Complaint incorporates herein by reference its answers to paragraphs 1-37.

19. The United States in answer to paragraphs 39, 40, 41, and 42 of the Amended Complaint lacks sufficient knowledge or

information to form a belief as to the truth of the allegations contained therein.

SIXTH DEFENSE

20. The United States in answer to paragraph 43 of the Amended Complaint incorporates herein by reference its answers to paragraphs 1-42 of the Amended Complaint.

21. The United States in answer to paragraphs 44, 45, 46, 47, and 48 of the Amended Complaint denies the same.

SEVENTH DEFENSE

22. The United States in answer to paragraph 49 of the Amended Complaint incorporates herein by reference its answers to paragraphs 1-48 of the Amended Complaint.

23. The United States in answer to paragraphs 50, 51, 52, 53, and 54 of the Amended Complaint denies the same.

EIGHTH DEFENSE

24. The United States specifically denies each and every allegation of the Amended Complaint not specifically admitted herein.

NINTH DEFENSE

25. The United States hereby alleges as an affirmative defense that it has not waived its sovereign immunity for punitive damages, prejudgment interest, or attorney's fees, and therefore,

these demands against the United States should be stricken as a matter of law. 28 U.S.C. §§ 2401(b) and 2671-2680.

TENTH DEFENSE

26. The United States hereby alleges as an affirmative defense the lack of subject matter jurisdiction in Count VI of the Amended Complaint, paragraphs 49-54, which sound in contract, not tort. The United States has filed a motion to dismiss this count against it.

27. The United States hereby alleges as an affirmative defense all defenses available to it under the terms and conditions of the West Virginia Medical Professional Liability Act, as amended, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), and 2671-2680.

28. The United states alleges as affirmative defenses comparative or contributory negligence; preexisting condition which proximately caused the injury and damages alleged; lack of causation and/or proximate cause and the acts of persons or entities not under the control of the United States.


29. The United States reserves the right to file third party claims and claims for contribution as warranted by the facts developed.

WHEREFORE, the United States prays this court enter judgment in its favor on the grounds set forth herein and afford it such other relief to which it may be entitled.

Respectfully submitted,

KASEY WARNER  
United States Attorney

By:

  
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CERTIFICATE OF SERVICE


I hereby certify that service of the foregoing "UNITED STATES' ANSWER TO AMENDED COMPLAINT" was made this 12th day of August, 2003, by mailing a true copy properly addressed thereof to the following:

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